In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-224

JOSEPH ALFRED TANNER AND
JACK ALTER PEARL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on one count charging a conspiracy to violate 18 U.S.C. (1964 ed.) 837, 1363, 1364, 1992 and 2275, in violation of 18 U.S.C. 371, and on three substantive counts charging, respectively, the interstate transportation of explosives for the purpose of bombing property, in violation of 18 U.S.C. 837,

the destruction of a vessel within the special admiralty and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1363, and the setting fire to and placing bombs and explosives upon a vessel of foreign registry within the jurisdiction of the United States, in violation of 18 U.S.C. 2275. They received concurrent prison sentences of one year on the count charging a violation of Section 837 and five years on the other counts. The court of appeals reversed the convictions on the Section 837 count for duplicity and on the Section 1363 count for lack of jurisdiction, and also reversed petitioner Pearl's conviction on the conspiracy count on grounds of double jeopardy. The convictions of petitioner Tanner on the conspiracy count and of both petitioners on the Section 2275 count were affirmed.

The chief government witness was a co-defendant, Alvin Junior Cupp, whose case had been severed and tried earlier; in his trial, Cupp had been convicted on the counts charging conspiracy and violations of Sections 837 and 1363. In his statements and testimony prior to petitioners' trial, Cupp had reversed his position several times. Initially he appeared before the grand jury as a government witness, confessing his own participation in the offenses and implicating petitioners. Subsequently, however, he recanted his grand jury testimony to petitioners and accused the government of suborning perjury. Tape recordings which were made of his recantation were seized by the government when petitioner Pearl was arrested for non-possession of his draft card, an arrest and seizure

which were thereafter held to be unlawful.[1] Cupp's case was then severed from that of his co-defendants, and he was brought to trial first. Prior to his trial, he moved to suppress his grand jury testimony on the grounds that it had been coerced by threats and promises and constituted perjury fabricated by the government. The district court denied his motion in a written opinion which rejected as unworthy of belief each of his specific allegations of coercion. At his trial, Cupp denied the truth of his entire grand jury testimony. After conviction, however, he agreed to appear as a government witness at petitioners' trial. He was extensively cross-examined during the trial below, on the basis of his prior testimony at his own trial and the tape recordings which he had made for petitioners; he testified that both were false and asserted that the statements he made in the tape recordings had been composed by petitioners.

1. Petitioners contend (Pet. 37-39) that Cupp's testimony, regardless of its truthfulness, was constitutionally inadmissible because it was coerced and was in any event incredible as a matter of law in light of his prior conflicting statements. However, petitioners' allegations of coercion are based on claims made by Cupp prior to his own trial, and these claims were rejected by the district court at the suppression hearing held prior to that trial and recanted by Cupp on cross-examination in the trial below (see Pet. 28-36). In these circumstances Cupp's testimony was

[1] Cupp informed the government of the existence of the recordings prior to their seizure (see Pet. 41).

properly admitted by the trial court. Cf. *United States* v. *LePera*, 443 F. 2d 810, 812 (C.A. 9), certiorari denied, 404 U.S. 958; *Bryson* v. *United States*, 419 F. 2d 695, 698-699 (C.A. D.C.). The credibility of the testimony in light of prior conflicting statements and any alleged coercion was a matter for determination by the jury which, unlike the jury in *Mesarosh* v. *United States*, 352 U.S. 1, had been presented with all relevant impeaching information and allegations. *Hoffa* v. *United States*, 385 U.S. 293, 311-312.

2. Petitioners make three contentions based on the unlawful seizure of the tape recordings. First, they argue (Pet. 39-40) that Cupp's testimony should have been suppressed as "fruit of the poisonous tree." This was not, however, a case in which the government learned of the existence of a potential witness as the result of unlawful action on its part. It had already developed Cupp as a witness and also knew of his purported recantation. Nor was possession of the recordings the causative factor which enabled the government to convince him to testify as he had originally agreed. He did not decide to follow that course until he had himself been convicted on the indictment in a trial in which the recordings played no part.

Petitioners also argue (Pet. 40-43) that the seizure of the tapes constituted an intrusion into defense strategy which deprived them of the element of surprise which they would have had if Cupp had persisted in the recantation recorded on the tapes. This

argument rests on the erroneous assumption, discussed above, that Cupp's decision to testify for the government was the product of the seizure of the tapes. Moreover the record shows that, before the tapes were seized, Cupp was approached by an FBI agent who had seen him meeting with Pearl and that Cupp agreed at that time to discuss his contacts with Pearl. Cupp told the agent about the tapes and his reason for making them, *i.e.*, to obtain money pursuant to a deal with the union (App. 2739-2740, 2750-2755, 2869-2871).[2] Thus the fact of Cupp's recantation and the substance of his recorded statement were known to the prosecution before the seizure of the tapes. Furthermore, Cupp's testimony at his own trial and at the suppression hearing preceding it was generally consistent with his recorded statements, so that similar testimony by him at petitioners' trial would not in any event have constituted a strategically valuable surprise.

Finally, petitioners argue (Pet. 43-46) that they should have been permitted to impeach Cupp's testimony on cross-examination that they and their attorneys had composed the statements which he had recorded, by playing the entire recordings to the jury so that it could determine whether his taped statements sounded rehearsed. The judge initially ruled that while the defense could ask Cupp about any statement on the tape, the tape itself could be played only if Cupp denied making the statement.

[2] "App." refers to the joint appendix lodged in the court of appeals.

The attorney for Pearl, who was authorized to play the impeaching portions of the tape, began running an unedited version. The court allowed the tape to run for eight to ten minutes uninterrupted and then stopped it. The court noted (App. 4028-4029) that, although it regarded the evidence as incompetent, it had permitted the running of the tapes "on the theory of the defendants" that "the jury would be entitled to hear the manner in which Mr. Cupp responded to the questions propounded to him by Pearl in this tape-recorded conversation." The judge found that the tape had played a sufficient time for that purpose. Thus petitioners did have part of the tapes played for the purpose for which they asserted they were admissible. The court clearly did not abuse its discretion in refusing to permit the tapes to be played in their entirety for that limited purpose.

The petition raises eight additional questions (Pet. 4-6) which are not discussed there which petitioner wishes to preserve in the event his petition for certiorari is granted (Pet. 4). To the extent these questions were raised and considered below, we rely on the opinion of the court of appeals as setting forth our position.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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